Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

ODIS L. TABOR,

Petitioner,

v.

FREIGHTLINER OF CLEVELAND, LLC

Respondent.

On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the
Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court reverse the United States Court of Appeals for deciding a race employment discrimination case in a way that conflicts with clear precedent of this Court, by affirming grant of summary judgment to the defendant, in spite of plaintiff's offering evidence that employees of other races within the same general time period were disciplined less severely or not at all by defendant for comparable or more serious misconduct?

LIST OF PARTIES
TO THE PROCEEDING BELOW

The parties in the court below are contained in the caption. There is no party with an interest to disclose pursuant to Rule 29(6).

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OPINION BELOW

The unpublished per curiam opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the appendix to this petition. (Pet. App. A).

JURISDICTION

Judgment was entered in this case by the United States Court of Appeals for the Fourth Circuit on July 20, 2010. This Court has jurisdiction to review on a writ of certiorari the judgment in question pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, of the Constitution of the United States:

> The Congress shall have Power . . . To regulate Commerce . . . among the several states . . .

Fourteenth Amendment to the Constitution of the United States:

> Section 1. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate

legislation, the provisions of this article.

42 U.S.C. § 2000e-2(a)(1).

Unlawful employment practices:

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

STATEMENT OF THE CASE

The basis for the jurisdiction of the United States Court of Appeals for the Fourth Circuit was 28 U.S.C. § 1291, the appeal of the final decision of a United States District Court. The basis for the jurisdiction of the United States District Court for the Middle District of North Carolina was 42 U.S.C. § 2000e-5(f)(3).

The District Court granted respondent's motion for summary judgment on May 1, 2009. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit on May 28, 2009.

Petitioner is bi-racial. His mother is African-American, and his father is Caucasian.

Respondent acknowledged that it does not contest this assertion. Petitioner's bi-racial status was well known to respondent's management.

Petitioner contends that he was fired because he insisted on treating people fairly without regard to race in his position of union steward.

A group of black employees, sometimes referred to as the "civil rights committee" wanted petitioner to show favoritism toward them and to treat white employees less favorably. Petitioner refused to go along with this racism. This group of black employees commonly referred to petitioner as a "half-breed" or a "house nigger." Respondent's

management was well aware of the "civil rights committee's" opposition to petitioner on account of his being an advocate color-blind treatment of employees. Petitioner maintains that respondent's management took the easy way out in this conflict and supported the black racists to petitioner's detriment.

Jerry Lovell, a black employee, appeared to be point man for the "civil rights committee." On October 27, 2006, Mr. Lovell was told by plaintiff in his capacity as union representative that he had not signed up in time in order to be eligible for overtime work. Mr. Lovell's response was, "You ain't worth a damn. You ain't nothing but a white man's nigger. . . . I'm going to whip your ass." Mike

McGarrity, a member of management, heard every word, but management did nothing. Mr. Lovell continued to threatened plaintiff verbally and then walked threateningly toward him with his fists balled up. As a result of this confrontation, Mr. Lovell, although the aggressor, received a five-day suspension, whereas, petitioner, the victim of the aggression, was suspended for ten days.

Petitioner in his role as union representative, was conducting an employee meeting at the plant on January 5, 2007. Mr. Lovell arrived late at the meeting and said, "[H]e ain't s - - -; don't listen to what he got to say. . . . [H]e hang [out] with the white boys. . . ." Petitioner told his supervisor Johnny Jones

what had happened, but no action was taken. Petitioner went to the human resources office to report the matter, and again no action was taken.

On January 13, 2007, Mr. Lovell sought at a union meeting at the West Rowan High School to have petitioner removed as union representative. Petitioner stated in the meeting that Mr. Lovell had called him a "white man's nigger." Mr. Lovell came up in back of petitioner. Persons present at the meeting warned petitioner that he was about to be attacked. Petitioner turned and found that Mr. Lovell was less than three feet away. Petitioner continuously backed away from Mr. Lovell. At the time petitioner was holding a

toy flexible rubber knife (that he had taken from one his children since he does not allow the children to play with guns and knives), which he inadvertently removed from his jacket pocket at the meeting and held it at all times below waist level.

Petitioner's conduct at the union meeting is respondent's basis for dismissing petitioner from his employment on February 5, 2007.

Respondent took no action whatever against Mr. Lovell for having advanced threateningly on petitioner at the meeting.

Petitioner was acquitted of the criminal charges brought against him for possession a weapon on school grounds, the judge being of

the opinion that the witnesses testifying against petitioner were not credible. Likewise, union charges brought against petitioner based on the events of the union meeting, resulted in the exoneration of petitioner.

REASONS WHY THE WRIT SHOULD ISSUE

THIS COURT SHOULD REVERSE THE UNITED STATES COURT OF APPEALS FOR DECIDING A RACE EMPLOYMENT DISCRIMINATION CASE IN A WAY THAT CONFLICTS WITH CLEAR PRECEDENT OF THIS COURT, BY AFFIRMING GRANT OF SUMMARY JUDGMENT TO THE DEFENDANT, IN SPITE OF PLAINTIFF'S OFFERING EVIDENCE THAT EMPLOYEES OF OTHER RACES WITHIN THE SAME GENERAL TIME PERIOD WERE DISCIPLINED LESS SEVERELY OR NOT AT ALL BY DEFENDANT FOR COMPARABLE OR MORE SERIOUS MISCONDUCT.

Rule 10(c) of this Court's rules indicates that this Court will exercise its discretion to insure uniform adherence to its precedence by the federal courts of appeal.

The decision of the United States Court of Appeals for the Fourth Circuit in this case is per curiam and unpublished, thus a decision of very low visibility. Unfortunately, the courts of appeal over the years in a great many instances have silently departed from and rejected this Court's clear mandates with regard to allowing employment discrimination cases to go to jury trial. On a number of occasions the courts of appeal have been reversed by this Court for failing to adhere to its rather plain pronouncements that

evidentiary disputes must be resolved by a jury trial, rather than by judge at summary judgment. E.g., *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006), reversing 129 Fed. Appx. 529 (11th Cir. 2005); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), reversing 197 F.3d 688 (5th Cir. 1979); *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), reversing 463 F.2d (8th Cir. 1972); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), reversing 608 F.2d 563 (5th Cir. 1980).

Petitioner asks this Court, once again, to make it clear that where there are disputed facts in an employment discrimination case, these facts must be resolved by the jury at

trial, and summary judgment is not permissible.

This Court's *prima facie* case analysis, most recently articulated in *Reeves v. Sanderson Plumbing Products, Inc., supra,* 530 U.S. at 142, is simple and elementary, and ordinarily attainable by one who complains of employment discrimination. All that is required for a *prima facie* case is membership in a protected class, qualification for the position, dismissal, and the position remaining open or being filled by another. Yet, in a tortured and incomprehensible analysis, the United States Court of Appeals for the Fourth Circuit in this case conflated the *prima facie* case analysis with the analysis that applies

when evidence is offered in rebuttal of the employer's assertion of a legitimate reason for the dismissal, of disparate treatment in the disciplining of employees of different races. (Appendix A, p. 38).

In the present case, petitioner satisfied his *prima facie* case requirement. He shifted the burden to respondent to produce evidence that petitioner was dismissed for a legitimate, non-discriminatory reason. *Reeves v. Sanderson Plumbing Products, Inc., supra,* 530 U.S. at 142. Respondent never discharged this burden, because its articulated reason, punishing petitioner for holding a toy flexible rubber knife at a union meeting off premises and off the clock, could not have formed a

legitimate reason for dismissing petitioner, since respondent's interference in this manner with a union meeting constituted an unfair labor practice.

An interference with union activity in violation of 29 U.S.C. § 158(a)(1), (2) and (3), by its very definition, cannot be a legitimate basis for dismissal. Under the National Labor Relations Act, "[U]nlawful interference occurs when the employer . . . interferes with internal union administration. . . ." 1 The Developing Labor Law 414 (4th ed. 2002).

The policy of the Act is to insulate employees' jobs from their organizational rights. *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 40 (1953). The prohibitions of §

158(a) are "broad enough to embrace participation in union activities . . ." *Local Union of United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 695 (1963). See *Crown Central Petroleum Corp. v. N.L.R.B.*, 430 F.2d 724, 731 (5th Cir. 1970) (employee charging a member of management with lying protected under § 158(a), even if the remark was not justified; employer committed unfair labor practice by disciplining the employee).

Even if respondent could get around the problem of basing its discharge of petitioner on its own unfair labor practice, petitioner sufficiently rebutted any conceivable claim of legitimacy of the discharge decision, by

showing how employees of other races were treated in a way more favorable than petitioner for acts of comparable or greater seriousness. "Especially relevant to such a showing would be evidence that white employees involved in acts against [the employer] . . . of comparable seriousness . . . were nevertheless retained or rehired. [An employer]. . . may justifiably refuse to rehire one who was engaged in unlawful . . . acts . . . , but only if this criterion is applied alike to members of all races. . . ." *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 804.

Petitioner, a bi-racial, was fired for defending himself by holding a small rubber knife to fend off an imminent assault in an off-

premises after-hours non-company meeting, whereas, Jerry Lovell, the black aggressor employee, had no action whatever taken against him. The record shows the following assaults and threats of death and physical injury that were made both on-premises and off-premises by both black and white employees, who either received no discipline whatever, or had disciplinary action against them rescinded:

1. In July, 2006, Jerry Lovell, a black employee, threatened to whip Jomo Julue, another black employee, after work. This incident was reported to Johnny Jones, the supervisor. No action was taken against Mr. Lovell for this incident.

2. and 3. In August, 2006, and again in September, 2006, Jerry Lovell got into an altercation with Desmond Ward, another black employee, at the workplace. In each instance, there was a verbal exchange between these employees, and they began to fight, but before they could make bodily contact, they were pulled apart. No disciplinary action was taken.

4. Vincent Montgomery, a black employee, made racial remarks and threats to Jacob Scott, a white employee, and also Mr. Montgomery, as a Muslim, made derogatory remarks about Mr. Scott's Christian faith. Mr. Montgomery put his hands on Mr. Scott in an aggressive way. Mr. Scott was reduced to

tears. These events occurred on company premises during working hours on December 11, 2006. Mr. Montgomery was fired, but soon afterwards, he was brought back to work and given back pay.

5. Robert Henderson, a black employee, placed hands in a hostile manner on Michael Scott, a black employee, at the company premises during working hours on May 25, 2006. Mr. Henderson had a metal pipe in his hand and was threatening to hit Mr. Scott. This incident was reported to a supervisor. Mr. Henderson received three days' suspension from work, but this was withdrawn, and he was given back pay.

6. Lyn Harris, a white employee, hit

Russell Parker, also white, on May 9, 2006, with his hand on Mr. Parker's face, which left a bruise, and he also hit Mr. Parker in the chest. Mr. Harris further threatened to use a gun or a knife against Mr. Parker. These incidents occurred on company property during working hours. Mr. Harris was terminated, but he was later brought back to work with full pay.

7. Lafreda Renwick, who is black, got into a physical fight outside the workplace with Kenya Dalton, a co-worker. The aggressor employee was offered her job back with full pay.

8. Finally, of course, the events that resulted in plaintiff's discharge must be

considered in this context. Plaintiff, who is bi-racial, received the ultimate penalty of dismissal for his conduct of holding a rubber knife and constantly retreating to fend off an imminent attack. His attacker, Mr. Lovell, who is black, received no punishment whatever, not even a warning.

It is impossible to understand the analysis of the Court of Appeals, which merely stated blandly in its opinion, that petitioner had "failed to show a genuine issue of material fact demonstrating that his misconduct was comparable in seriousness to actions of employees outside his class or that he was disciplined more severely than employees whose actions were comparable." (Appendix A,

p. 38). The District Court erroneously disregarded incidents 4, 5, 6, and 7, because some disciplinary action had been imposed (Appendix B, p. 85), but in making this determination, the court disregarded the clear instructions of this Court in *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. at 804, that rescission of disciplinary action where the employee is "nevertheless retained or rehired," is deemed to be no disciplinary action for the purposes of this analysis.

The Court of Appeals altogether disregarded this Court's instruction in *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 283, n. 11(1976), that "precise equivalence in culpability between

employees is not the ultimate question", and merely for the plaintiff to show that the "other 'employees['] [whose] acts against [the employer] of comparable seriousness were nevertheless retained . . . is adequate.'" [emphasis in the original].

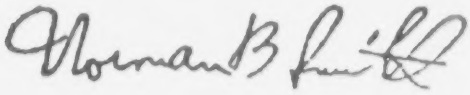
It is plain, therefore, that the United States Court of Appeals for the Fourth Circuit invaded the jury's province by making credibility determinations, weighing the evidence, and drawing inferences from the facts. All of these functions are off-limits for the court in a summary judgment proceeding, and are to be reserved strictly for the jury at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986); *Reeves v. Sanderson*

Plumbing Products, Inc., supra, 500 U.S. at 150.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court grant his petition for writ of certiorari.

This the 13 day of October, 2010.



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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1625

ODIS L. TABOR,

Plaintiff - Appellant,

v.

FREIGHTLINER OF CLEVELAND, LLC,

Defendant - Appellee

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro, William L. Osteen, Jr., District Judge. (1:08-cv-00034-WO-WWD)

Submitted: June 30, 2010
Decided: July 20, 2010

Before NIEMEYER and SHEDD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Norman B. Smith, SMITH, JAMES, ROWLETT & COHEN, LLP, Greensboro, North Carolina, for Appellant. John J. Doyle, Jr., Robin E. Shea, CONSTANGY, BROOKS & SMITH, LLC, Winston-Salem, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

APPENDIX A

PER CURIAM:

Odis L. Tabor appeals the district court's grant of summary judgment in favor of the Defendant, Freightliner of Cleveland, LLC, in his employment discrimination action. On appeal, Tabor argues that the district court erred in granting summary judgment for Freightliner, alleging that he established a prima facie case of racial discrimination, specifically disparate treatment based on race, and that Freightliner did not provide a legitimate, non-discriminatory reason for his discharge. Finding no reversible error, we affirm.

We review a district court's grant of summary judgment de novo, "viewing the facts

and the reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Emmett v. Johnson, 532 F.3d 291, 297 (4th Cir. 2008); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). If the moving party sufficiently supports its motion for summary judgment, the nonmoving party must demonstrate that there are genuine

issues of material fact. Emmett, 532 F.3d at 297.

Title VII declares that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . ." 42 U.S.C. § 2000e-2(a)(1) (2006). A plaintiff may avoid summary judgment on a racial discrimination claim "through two avenues of proof." Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284 (4th Cir. 2004). First,

> A plaintiff can survive a motion for summary judgment by presenting direct or

circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision. . . . Alternatively, a plaintiff may proceed under the McDonnell Douglas [Corp. v. Green, 411 U.S. 792 (1973)] ' "pretext" framework, under which the employee, after establishing a prima facie case of discrimination, demonstrates that the employer's proffered permissible reason for taking an

> adverse employment action is actually a pretext for discrimination.

Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005) (internal quotation marks and brackets omitted). It is well established that, even under the McDonnell Douglas burden-shifting scheme, the ultimate burden of persuasion remains on the plaintiff at all times. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Tabor has failed to present any direct or circumstantial evidence creating a genuine issue of material fact that he was discriminated against because he is biracial. Therefore, his only avenue of avoiding

summary judgment is the McDonnell Douglas pretext framework. Under that standard, Tabor must first establish a prima facie case of racial discrimination. McDonnell Douglas, 411 U.S. at 802. The elements of the prima facie case will necessarily differ based on the facts presented. Id. at 802 n.13. Where, as here, a plaintiff alleges disparate discipline based on race, the plaintiff must prove that: (1) "he is a member of a class protected by Title VII;" (2) "the prohibited conduct in which he engaged was comparable in seriousness to misconduct of employees outside the protected class;" and (3) "the disciplinary measures enforced against him were more severe than those enforced against those other employees." Cook v. CSX

Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993). When assessing the seriousness of misconduct, "precise equivalence in culpability between employees is not the ultimate question . . . comparison can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." Moore v. City of Charlotte, NC, 754 F.2d 1100, 1107 (4th Cir. 1985) (internal quotation marks and citations omitted). If the plaintiff establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment action. McDonnell Douglas, 411 U.S. at 802.

We have thoroughly reviewed the record

and find that Tabor has failed to present a prima facie case of discrimination. Specifically, Tabor has failed to show a genuine issue of material fact demonstrating that his misconduct was comparable in seriousness to actions of employees outside his class or that he was disciplined more severely than employees whose actions were comparable.

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

ODIS L. TABOR	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:08CV34
	)	
FREIGHTLINER OF CLEVELAND, LLC	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

OSTEEN, JR., District Judge

Presently before the court is Defendant's Motion for Summary Judgment. (Doc. 17.) Plaintiff has filed a Memorandum in Opposition to Defendant's Motion for Summary Judgment (Doc. 20), and Defendant has filed a Reply (Doc. 21).

Counsel for both parties appeared in a hearing on March 13, 2009. This motion is now ripe for decision from the court. For the reasons set forth below, Defendant's Motion for Summary Judgment will be granted.

I. Background

Plaintiff Odis L. Tabor ("Plaintiff") initiated this lawsuit against Defendant Freightliner Truck Plant Cleveland, LLC ("Freightliner" or "Defendant"), alleging that he was terminated from him employment because he is bi-racial, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). As this is a motion for summary judgment, the facts set forth below are either undisputed or viewed in the

light most favorable to Plaintiff.

Defendant is a subsidiary of Daimler Trucks North America, LLC ("DTNA"), a manufacturer of commercial trucks. Plaintiff worked at DTNA's Cleveland, North Carolina manufacturing facility from March 2, 2004 until his discharge on February 5, 2007. During this time, he was an hourly rate employee and a shop steward for the third shift cab line employees at the Cleveland facility, where the hourly employees are represented by the United Auto Workers Union, Local No. 3520. Plaintiff testified in his deposition that he is bi-racial; his mother is African American and his father is Caucasian. (Tabor Dep. Vol. I at 184.)

Plaintiff also alleges that he told his supervisors and a member of management that he was bi-racial on a number of occasions, beginning in January 2006. (Tabor 2d Aff. ¶ 2.)

Several incidents between Plaintiff and Jerry Lovell, an African American employee, preceded Plaintiff's termination. The first occurred on October 27, 2006 (hereinafter "overtime incident"). Plaintiff, in his capacity as union representative, told Mr. Lovell that he was not eligible for some available overtime work because he had not signed up in time. Mr. Lovell allegedly responded by telling Plaintiff, "You ain't worth a damn. . . . You ain't nothing but a white man's n****r. . . .

You ain't s**t, I'm going to whip your ass." (Tabor Dep. Vol. I at 180-84.) According to Plaintiff, two supervisors and a manager witnessed the incident. (Id. at 183.) Plaintiff responded by saying, "If . . . you come up to me to try to hurt me or to bother me, then you're going to have respiratory problems. And it's going to be between you and Jesus if you live or die, because I'm going to drop you." (Id. at 185.) Mr. Lovell then apparently walked towards Plaintiff "with his fist balled and with expressions on his face of hostility." Id. at 188.) At that point, the supervisors stood in front of the two men to separate them and a manager told them to stop. (Id. at 189.)

Plaintiff then requested that all parties

go to Human Resources to report the incident. (Id.) Once at the Human Resources office, Plaintiff said he was "too upset at the moment to give a statement." (Id. at 192.) When Plaintiff returned to work the following day, Human Resources specialist Amanda Bilyeu told him that he was suspended. (Id. at 195.) At that time, Plaintiff had apparently prepared a statement, but did not give it to Ms. Bilyeu. (Id. at 195-96.) Plaintiff received a ten-day suspension, and Mr. Lovell received a five-day suspension.[1] (Id. at 199.) When

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1 Ms. Bilyeu's affidavit suggests that Mr. Lovell did submit a written statement to the company regarding the incident. (Bilyeu Aff. ¶ 7.) Richard Klinedinst, who was Human Resources manager at the time, said that he consulted with the union and agreed to suspend both men for te days, but would reduce the suspensions to five days each if they accepted the discipline unprotested. (Klinedinst

Plaintiff returned to work after his ten-day suspension, he provided the company with the written statement. (Id. at 196-97.)

The second incident occurred on January 5, 2007. Plaintiff, in his capacity as a union representative, was speaking at a team "huddle" meeting at the Cleveland facility. Plaintiff stated that while he was giving out information at the beginning of the meeting, Mr. Lovell "came up and started saying offensive things" including, "He ain't s**t, don't listen to what he got to say. . . . He hangs out with the white boys." (Id. at 213-14.) The

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Aff. ¶ 8.) "Lovell agreed not to protest the discipline, so he got a five-day suspension. Tabor did not, so he was suspended for 10 days. Both men were also ordered to undergo anger management counseling." (Id.)

supervisor on duty referred Plaintiff to Human Resources, and Plaintiff explained to Ms. Bilyeu what had happened. (Id. at 214.) Ms. Bilyeu and Steve Barber, a union representative, investigated the incident by obtaining statements from various witnesses. (Id. at 215.)

Following the investigation, Plaintiff complained that management had not taken any action against Mr. Lovell as a result of his conduct at the huddle meeting. (Id. at 217.) However, the statements Ms. Bilyeu obtained from the employees who witnessed the incident did not completely corroborate Plaintiff's recollection of the incident. Specifically, the witnesses all heard Mr. Lovell

say things directed at Plaintiff, but they heard Mr. Lovell say something to the effect of, "You all are crazy as hell," or "Don't listen to him, he is not going to represent you anymore." (See generally Bilyeu Aff. Ex. C.) Based on these statements, Ms. Bilyeu determined that Mr. Lovell "had made some snide comments during the huddle meeting but nothing that warranted formal discipline." (Bilyeu Aff. ¶ 9.) Nevertheless, Ms. Bilyeu and Lynn Thayer, Manager of Personnel and Administration, "counseled Lovell, telling him that Tabor had not done anything wrong and that Lovell needed to keep the Union charges off the floor (that is, not discuss them at work)." (Id.)

The third incident took place on

January 13, 2007 (hereinafter "union meeting incident"). Both Plaintiff and Mr. Lovell attended a union meeting in the West Rowan High School auditorium. (Tabor Dep. Vol. I at 231; Tabor Dep. Vol. II at 30.) On that evening's agenda was an official complaint by Mr. Lovell, attempting to have Plaintiff removed as union representative due to Plaintiff's behavior at the October 27, 2006 "overtime incident." (Tabor Dep. Vol. I at 219-20.) Plaintiff knew that the complaint against him was on the evening's agenda, and expected Mr. Lovell to appear at the meeting. (Id. at 220-21.) Plaintiff also testified that just before the meeting, he had taken a rubber or plastic toy knife that his son and godson were

playing with and put it in his briefcase. (Id. at 221-22.) In his deposition, Plaintiff acknowledged that the knife looked real, stating that "[i]t was a rubber, plastic toy that look [sic] like a knife." (Id. at 221.) At some point during the meeting, the toy knife fell out of his bag and he put it inside his coat. (Id. at 223.)

The details surrounding what happened at the meeting vary, but this court will rely on Plaintiff's deposition testimony and the reports witnesses gave to Defendant, to the extent they are not in dispute. Plaintiff was seated towards the front of the auditorium near or on the stage, facing the President, George Drexel. (Id. at 230-31.) At one point during the

meeting, Plaintiff had the floor to respond to Mr. Lovell's comments. (Id. at 226.) According to Plaintiff:

> Mr. Lovell said what he had to say, and he sat down. When I stood up to say what I needed to say, I said it. And when I addressed the issue, I had my back turned. I had no idea that Mr. Lovell was coming up on me. Mr. Lovell jumped up when I brought the issue, because a lot of people did not know that Lovell was angry because I addressed the issue of him calling me a white man's n****r. And therefore,

everybody in the place got upset.

And when my back was turned, Mr. Lovell jumped up and left his seat and came up on the back of me, and I had no idea that he was even on the back of me coming down the aisle. And people started yelling, "Don't let that man come up on you." When I, - - they said, OT turn around."

When I turned around, Mr. Lovell was less than three feet from my back. And when I had my hands in my pocket, it was a natural instinct for me to pull my hand out, because he startled me.

> I stepped back. And I did not know that the knife was in my hand. And once I realized it, I kept my hand at my side and I continuously [sic] to walk backwards.

(Id. at 226-27.) At this point, Plaintiff testified that he heard someone yell, "He's got a knife," and "everyone got upset." (Id. at 232, 234.)

According to the statements of several witnesses, the meeting was quickly adjourned, and employees - some of whom apparently had children with them - quickly left the area. (See Bilyeu Aff. Ex. D.) The Sergeant-at-Arms, Todd Scott, was seated at the back of the auditorium during the meeting (Tabor

Dep. Vol. I at 231), but he apparently responded by trying to get the knife from Plaintiff after he pulled it from his pocket (see Bilyeu Aff. Ex. D). The police were also called, but Plaintiff had already left by the time they arrived. (See id.)

Immediately after the incident, Plaintiff was suspended from his work at the Cleveland plant. (Bilyeu Aff. ¶ 11.) Ms. Bilyeu investigated the matter and gathered written statements from several employees who had been at the meeting. (Id. ¶ 12 and Ex. D.) She also learned that Plaintiff had been criminally charged with possessing weapons on school grounds. (Id. at 13; Tabor Dep. Vol. II at 30.) Ms. Bilyeu presented the information to

Richard Klinedinst, who at that time was Human Resources Manager at the Cleveland facility. (Bilyeu Aff. ¶ 14; Klinedinst Aff. ¶ 14.) Mr. Klinedinst determined that the union meeting incident, "coupled with the October 27 threat against Lovell showed us that Tabor was a danger to our workplace." (Klinedinst Aff. ¶ 14.) Plaintiff was terminated by Freightliner on February 5, 2007. (Tabor Dep. Vol. II at 31.)

On December 13, 2007, Plaintiff filed a complaint in the General Court of Justice, Superior Court Division for Guilford County, North Carolina, alleging intentional discrimination on the basis of race in violation of 42 U.S.C. § 2000e-1(a). (Compl. ¶ 11.)

Defendant removed the case to United States District Court for the Middle District of North Carolina on the basis of federal question and diversity jurisdiction pursuant to 20 U.S.C. §§1332 and 1441. (Notice of Removal ¶ 3.) Following a period of discovery, Defendant filed a motion for summary judgment.

II. Legal Standard

Summary judgment is appropriate where an examination of the pleadings, affidavits, and other proper discovery materials before the court demonstrates that no genuine issues of material facts exist, thus entitling the moving party to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

If the moving party has met that burden, then the nonmoving party must persuade the court that a genuine issue remains for trial.

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial."

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations

and footnote omitted) (quoting Fed. R. Civ. P. 56). In considering a motion for summary judgment, the court is not to weigh the evidence, but rather must determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The court must view the facts in the light most favorable to the nonmovant, drawing inferences favorable to that party if such inferences are reasonable. Id. at 255. However, there must be more than a factual dispute; the fact in question must be material, and the dispute must be genuine. Fed. R. Civ. P. 56(c); Anderson, 477 U.S. at 248. A dispute is only "genuine" if "the evidence is such that a reasonable jury could return a verdict for the

nonmoving party." Anderson, 477 U.S. at 248.

III. Title VII Discrimination

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (2006). A Title VII plaintiff may avert summary judgment through two avenues of proof. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005) (internal citations omitted). "A plaintiff can survive a motion for summary judgment by presenting

direct or circumstantial evidence that raises a genuine issue of material fact as whether an impermissible factor such as race motivated by the employer's adverse employment decision." Id. Alternatively, a plaintiff may proceed under the "pretext" framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Id.[2]

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[2] The parties seem to differ on the effect of the Supreme Court's decision Desert Palace, Inc. v. Costa, 593 U.S. 90 (2003), on the standard for surviving summary judgment in Title VII cases. (See Pl.'s Mem. in Opp'n to Def.'s Motion for Summ. J. (Doc. 20) at 4; Def.'s Reply (Doc. 21) at 3-4.) The Fourth Circuit has since explained that

> in Title VII cases, the "prima facie case" . . . is never by itself sufficient to permit a plaintiff to escape an adverse summary judgment ruling except in the rare instance when an "employer is silent in the face of the presumption" it raises. Even then, of course, as in every

> employment discrimination case alleging disparate treatment, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318-19 (4th Cir. 2005) (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54 (1981)).

Under McDonnell Douglas, the plaintiff bears the burden of production and must establish a prima facie case of discrimination by the preponderance of the evidence. Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996). If the plaintiff-employee is successful at that step, the defendant-employer then has the opportunity to present a legitimate, non-discriminatory reason for its employment action. Id. Once the employer meets this burden, the presumption of discrimination created by the prima facie case "drops out of the picture," and the plaintiff-employee must show that the articulated reason was just pretext for

discrimination. Id. (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993); Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, 53 F.3d 55, 57-58 (4th Cir. 1995)). "The plaintiff always bears the ultimate burden of proving that the employer intentionally discriminated against [him]." Id. (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

Thus, under the burden-shifting model, "Plaintiff must first establish a prima facie case of disparate treatment." Jenks v. City of Greensboro, 495 F. Supp. 2d 524, 527 (M.D.N.C. 2007). The elements of a prima facie case will differ slightly depending on the nature of the challenged

employment action.[3] See Burdine, 450 U.S. at 254 n.6. To establish a prima facie case of racial discrimination in the enforcement of employee disciplinary measures, the plaintiff must show (1) that he is a member of a class protected by Title VII; (2) that the prohibited conduct in which he engaged was comparable in seriousness to misconduct of employees outside the protected class; and (3) that the

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[3] At the request of the court, the parties were asked to brief the issue of what prima facie elements they believe apply in this case. (See Order and Notice of Hr'g, Feb. 17, 2009 (Doc. 24).) Plaintiff suffested that the court look to Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), for the elements of the prima facie case. (See Doc. 25.) Defendant suffested that the appropriate standard was set forth in Moore v. City of Charlotte, 754 F.2d 1100 (4th Cir. 1985), and Cook v. CSX Transportation Corp., 988 F.2d 507 (4th Cir. 1993). This issue was resolved at the March 13, 2009 hearing when Plaintiff agreed that the Moore/Cook standards were appropriate in this case.

disciplinary measures enforced against him were more severe than those enforced against other employees. Cook v. CSX Trans. Corp., 988 F.2d 507, 511 (4th Cir. 1993) (citing Moore v. City of Charlotte, 754 F.2d 1100, 1105-06 (4th Cir. 1985)).

A showing of disparate discipline "usually requires direct comparisons in order to raise a presumption that Defendant's disparate treatment stemmed from Plaintiff's [race] rather than from [his] actions alone." Jenks, 495 F. Supp. 2d at 528. "While exact symmetry between Plaintiff's situation or actions and those of others is not required, they must be materially similar." Id. (citing Moore, 754 F.2d at 1107). Furthermore, it is

up to the trial court to assess the relative similarity of conduct or misconduct cited by the parties at the summary judgment stage. Id.; see also Moore, 754 F.2d at 1107 (noting that lower federal courts have the "difficult, but not unfamiliar, task of assessing the gravity of the offenses on a relative scale"). This court, in determining whether a prima facie case under Title VII has been made, must assess whether the record as a whole gives rise to a reasonable inference of racially discriminatory conduct by the employer. Cook, 988 F.2d at 512 (emphasis added).

IV. Analysis

Plaintiff proceeds under the McDonnell Douglas burden-shifting scheme, and asserts that he "has already met his initial burden to show that the was subjected to adverse employment action as a member of a legally protected racial classification." (Pl.'s Mem. in Opp'n to Def.'s Motion for Summ. J. (Doc. 20) at 5.) The court first notes that, as discussed above, these are not the only two elements needed to set forth a prima facie case of discrimination. Plaintiff further cites Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), for the proposition that "at summary judgment, the burden remains on defendant to disprove plaintiff's case. . . ." (Doc. 25 at 2.)

However, in Adickes, the Supreme Court merely stated that the party moving for summary judgment has "the burden of showing the absence of a genuine issue as to any material fact . . . ." Adickes, 398 U.S. at 157.[4] Once the moving party has met this burden, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. See Matsushita, 475 U.S. at 587; Fed. R. Civ. P. 56(e).

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[4] At trial, the ultimate burden is at all times on Plaintiff to prove intentional discrimination. Burdine, 450 U.S. at 253.

After examining the pleadings, affidavits, and other proper discovery material, this court concludes that Defendant has shown that there is no genuine issue of material fact for trial. Specifically, Defendant has produced evidence demonstrating that no one outside of Plaintiff's protected class engaged in comparable conduct and received less severe discipline for that conduct. Plaintiff has failed to advance sufficient admissible[5] proof showing that he had been disciplined more severely than other

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Rule 56(e) states that affidavits submitted in support or opposition to summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed. R. Civ. P. 56(e).

employees outside his protected class. Thus, "there [is] no disparity of treatment from which one could conclude that his discipline was a product of racial discrimination." Cook, 988 F.2d at 512.

There is sufficient evidence regarding the first element of the prima facie case of discrimination, as Plaintiff alleges discrimination based on race, a class protected by Title VII.[6] However, the record lacks sufficient admissible evidence that Plaintiff's conduct was comparable in seriousness to

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Plaintiff alleges that he is bi-racial. Defendant and Plaintiff do not brief the issue of how Defendant's race might affect the analysis. Because it is not necessary to the decision, the court assumes without deciding that Plaintiff is a member of a protected class.

misconduct of employees outside the protected class, or that the disciplinary measures taken against him were more severe than those taken against other employees. Plaintiff provides a list of ten incidents - alleged assaults and threats of death and physical injury, "made both on premises and off-premises by both black and white employees, who either received no discipline whatever, or had the disciplinary action against them rescinded[.]" (Doc. 20 at 8-10; see also Tabor Aff. ¶ 3.) The court concludes that these allegations are either based on inadmissible evidence or are insufficient to raise a genuine issue regarding the second and third elements of a prima facie case of disparate discipline.

Incident One[7] alleges that Mr. Lovell threatened to whip a fellow employee, Jomo Julue, after work. In his affidavit, Plaintiff states that "[t]hese facts were admitted to me by Mr. Jones in the course and scope of his duties as a supervisor." (Tabor Aff. ¶ 3a.) However, Plaintiff has not submitted a sworn statement of Mr. Lovell or Mr. Julue, the persons who were apparently involved who would have personal knowledge of the incident. See Fed. R. Civ. P. 45(e) ("A

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[7] Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment (Doc. 20) sets forth ten numbered incidents that he alleges are comparable to his own but where either no discipline was imposed or the disciplinary action was rescinded. (Doc. 20 at 8-10.) For ease of reference, the court will refer to the incidents named in this memorandum by the number used by Plaintiff in his Memorandum.

supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated."). Even assuming the threat itself is admissible, it is not clear that Mr. Jones's statement to Plaintiff is admissible as an admission of a party opponent, as there is no evidence that Mr. Jones's authority as supervisor included authority to make a statement on behalf of Defendant concerning disciplinary measures. See Precision Piping & Instruments, Inc. v. E. I. Dupont de Nemours & Co., 951 F.2d 613, 619 (4th Cir. 1991) ("authority in the context of 801(d)(2)(C) means 'authority to speak' on a particular

subject on behalf of someone else."). Nor is there any indication of whether Mr. Jones witnessed the incident himself or learned about it through another person, whose statement could also constitute hearsay.

Plaintiff also alleges that he has "personal knowledge" of several other incidents based on information he received in the course of his duties as a union representative investigating these matters.

However, Incidents Five and Eight[8] are based

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Incident Five alleges that Jomo Julue committed assault with his motor vehicle, attempting to hit several female black employees. (Doc. 20 at 9; Tabor Aff. ¶ 3d; Tabor Aff. Ex. 2.) Ms. Bilyeu, in her reply affidavit, responded that management was unable to verify the alleged car incident, but warned him about it in a letter. (Bilyeu Reply Aff. ¶ 6; Tabor Aff. Ex. 2.)

Incident Eight alleges that James Wilson, a white

on secondhand information Plaintiff apparently learned through others or through other unauthenticated hearsay documents submitted as exhibits. (See id. at ¶¶ 3d, 3g and Exs. 2, 5). Furthermore, these allegations are unconfirmed by Ms. Bilyeu, a person who might have personal knowledge of the incidents, or at least knowledge of the disciplinary actions taken against these employees. See supra note 8. These alleged incidents are therefore not supported by admissible evidence and will not be considered by the court.

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employee, made threats that he was going to have a hit list and was going to kill fellow employees. (Doc. 20 at 9; Tabor Aff. ¶ 3g; Tabor Aff. Ex. 6.) Ms. Bilyeu's reply affidavit states that she is "not personally familiar with the incident."

Regarding the remaining incidents (Two, Three, Four, Six, Seven, Nine, and Ten), Plaintiff either has asserted personal knowledge due to his presence at the incidents, or the incidents are confirmed or corroborated by Ms. Bilyeu in her reply affidavit. Nevertheless, the evidence regarding these incidents is still insufficient for a jury to conclude that Plaintiff's discipline was a result of intentional discrimination. The remaining incidents are either (1) not comparable to Plaintiff's behavior at either the "overtime incident" or the "union meeting incident" or (2) resulted in the same disciplinary measures as those imposed on Plaintiff.

Specifically, Incidents Two and Three describe two altercations between Mr. Lovell and Desmond Ward. In each case, there was a verbal exchange between the men, but before they could make bodily contact, they were pulled apart. (Doc. 20 at 8; Tabor Aff. ¶ 3b.) Plaintiff states that he personally broke up these altercations, and thus the court assumes he has personal knowledge of the incidents. (Tabor Aff. ¶ 3.) Still, these incidents are not comparable to Plaintiff's behavior. Unlike the "union meeting incident," there is no evidence here that any weapon[9] was involved in these

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[9] Even assuming that the knife Plaintiff displayed was a toy knife that simply resembled a real knife, its use could seen as threatening to Mr. Lovell or to others who experienced the confrontation. Although

altercations. Nor can these incidents be used as a comparisons to the "overtime incident," as there is no evidence of any verbal threat of death or bodily harm. Furthermore, following the "overtime incident," it was Plaintiff who insisted that the parties report the incident to Human Resources. (Tabor Dep. Vol. I, 189.)

Plaintiff claims he was not aware that he was holding the toy knife, others around him saw the knife and became upset as a result. (Tabor Dep. at 232, 234.) Furthermore, the use of a toy weapon during the commission of a crime is often deemed the culpable equivalent to the use of a real weapon in the context of a criminal conviction. See, e.g., United States v. Martinez-Jimenez, 864 F.2d 664, 668 (9th Cir. 1989) ("A robber's use of a replica or simulated weapon that appears to be a genuine weapon to those present at the scene of the crime, or to those charged with responsibility for responding to the crime, carries the same penalty as the use of a genuine weapon."), cert. denied, 489 U.S. 1099 (1989). Plaintiff has not presented any facts to suggest the presence of a toy weapon was less threatening because it occurred in the employment context.

According to Ms. Bilyeu, Incidents Two and Three were not reported to Human Resources. (Bilyeu Reply Aff. ¶ 4.)

This court will also assume that Plaintiff has at least some personal knowledge of Incident Ten, Mr. Lovell's behavior at the union meeting, even though Plaintiff by his own admission, "had no idea that [Mr. Lovell] was even on the back of me coming down the aisle" and when he did turn around, "Mr. Lovell was less than three feet from my back." (Tabor Dep. Vol. I at 227.) But even assuming that Plaintiff accurately characterizes

Defendant's behavior as an "imminent attack"[10] (Doc. 20 at 10), Mr. Lovell's behavior at the union meeting is still not comparable to Plaintiff's, as there is again no evidence suggesting Mr. Lovell brandished any type or weapon, either real or fake. See Moore, 754 F.2d at 1107 ("the 'comparison [of offenses] can be made in light of the harm caused or threatened to the victim or society . . . .'" (quoting Solem v. Helm, 463 U.S. 277, 292 (1983)).

The evidence regarding Incidents Four,

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[10] This court will make this assumption for purposes of summary judgment, but notes that the witness statements all suggest that Mr. Lovell did not pose a threat to Plaintiff, nor was he acting aggressively towards Plaintiff. (See generally Bilyeu Aff. Ex. D.)

Six, Seven, and Nine[11] shows that the employees who engaged in behavior that could be arguably comparable to Plaintiff's were given the same discipline as Plaintiff. Specifically, Incident Four involved an African American Muslim employee, Mr. Montgomery, allegedly harassing a white Christian coworker based on his race and religion. (See Doc. 20 at 8; Tabor Aff. ¶ 3c; Bilyeu Reply Aff. ¶ 5.) Even assuming that this incident is

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[11] Plaintiff's allegations regarding these incidents are either again based on hearsay or on information he learned "in the course and scope of [his] business as a union representative." (Tabor Aff. ¶¶ 3c, 3e, 3f.) Nevertheless, Ms. Bilyeu has admitted some familiarity with a few of the incidents as set out in her reply affidavit and thus the court assumes that these incidents are not in dispute. However, to the extent that the facts are in dispute, the court will rely on Ms. Bilyeu's knowledge of the incidents and of the disciplinary action taken against the employees.

comparable to either the "overtime incident" or the "union meeting incident," Ms. Bilyeu confirmed that Mr. Montgomery was discharged, as was Plaintiff.[12] (Bilyeu Reply Aff. ¶ 5.)

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Ms. Bilyeu also confirmed that Mr. Montgomery was reinstated as settlement for his grievance but has been on layoff status since his reinstatement. However, the fact that certain employees were reinstated or settled their grievances as a result of the union grievance process "is not usually probative of discrimination" since these decisions are not independent, voluntary decisions on the part of the employer. Hearne v. United Parcel Serv., Inc., No. 5:[illegible]CV-117, 2007 WL 3287758, at *13 (E.D.N.C. Nov. 2, 2007) (citing Hiatt v. Rockwell Int'l Corp., 26 F.3d 761, 770-71 (7th Cir. 1994)).

Furthermore, the court has not received any evidence regarding any possible settlement Plaintiff may have reached with Defendant over this matter. Therefore, any evidence regarding another employee's reinstatement or settlement is not entirely relevant, since the court is unable to make an accurate comparison between the two. For these reasons, only the initial disciplinary action taken will be considered.

Incident Six alleges that Robert Henderson, a black employee, placed his hands in a hostile manner on Michael Scott and "had a metal pipe in his hand and was threatening to hit Mr. Scott." (Doc. 20 at 9; Tabor Aff. ¶ 3e; Tabor Aff. Ex. 3.) Ms. Bilyeu's affidavit recites a very different set of facts. Specifically, Ms. Bilyeu explained that she understood that Mr. Henderson threatened to hit Mr. Scott with a drill (not a metal pipe), not kill him, as she interpreted Plaintiff to threaten Mr. Lovell at the "overtime incident." (Bilyeu Reply Aff. ¶¶ 7, 11.) She also provides that following the incident, Mr. Henderson was suspended for five days, ordered to the Employee Assistance Program,

and drug tested upon his return to work. (Id. ¶ 7.) Again assuming that this incident is comparable to the "overtime incident," Plaintiff was also offered a five-day unprotested suspension plus anger management, but he refused that offer and was suspended for ten days. (Id. ¶ 11.) Furthermore, even assuming that this incident is comparable to the "union meeting incident," Defendant has made it clear that it was the combination of Plaintiff's behavior at the "overtime incident" and the "union meeting incident" that led to his discharge. (Klinedinst Aff. ¶ 14.) Plaintiff has not presented any evidence regarding Mr. Montgomery's past

disciplinary record permitting a comparison to Plaintiff's disciplinary record, or evidence that Mr. Montgomery's suspension would support any type of inference of discrimination as to Plaintiff.

Incident Seven alleges that Lyn Harris hit Russell Parker in the face and chest and, according to Plaintiff, also threatened to use a gun or knife on him. (See Doc. 20 at 9; Tabor Aff. ¶ 3f; Bilyeu Reply Aff. ¶ 8.) Ms. Bilyeu's investigation revealed that Mr. Harris had slapped Mr. Parker, but did not threaten him with a weapon, and regardless, Mr. Harris was

also terminated.[13] (Bilyeu Reply Aff. ¶ 8.) Again, even assuming that this incident is comparable to those involving Plaintiff, Mr. Harris received the same discipline as Plaintiff.

Finally, Incident Nine alleges that Lafreda Renwick got into a physical fight outside the workplace with Kenya Dalton, a coworker. (See Doc. 20 at 9; Tabor Aff. ¶ 3h; Bilyeu Reply Aff. ¶ 10.) The court will again assume that the incident would be comparable to those that are the subject of this lawsuit. Even so, just as Plaintiff was terminated

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[13] Again, Ms. Bilyeu also confirmed that Mr. Harris was reinstated as settlement of his grievance, but the court concludes that this evidenced is not probative of discrimination, nor relevant in this matter. See supra note 12.

following those incidents, Ms. Renwick was terminated.[14] (Bilyeu Reply Aff. ¶ 10.)

There is one additional reason why Plaintiff's claim should be dismissed for failing to set forth a prima facie case from which a jury could infer intentional discrimination. Defendant has shown that there is no genuine issue of material fact as to whether the disciplinary decisionmaker - in this case, Mr. Klinedinst - knew that Plaintiff was bi-racial. Defendant has produced evident that until this lawsuit, Mr. Klinedinst "had always believed that Tabor was African-American, as was

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[14] Ms. Bilyeu also stated that Ms. Renwick was given some money as a settlement, but for the reasons set forth supra note 12, this settlement is not relevant for purposes of comparing the severity of the discipline imposed.

Lovell." (Klinedinst Aff. ¶ 7.) Plaintiff has failed to offer proof that Mr. Klinedinst knew or should have known that Plaintiff was bi-racial. "[T]he McDonnell Douglas elements would not rationally create [an inference of intentional discrimination] if . . . there is no showing by direct or indirect evidence that the decision-maker knew [the plaintiff's race]." Robinson v. Adams, 847 F.2d 1315, 1316 (9th Cir. 1989) (en banc) (citations omitted), cert. denied, 490 U.S. 1105 (1988). See also Cupples v. AmSan, LLC, 282 F. Appx. 205, 210 (4th Cir. 2008) (affirming summary judgment where there was no indication or suggestion that the decisionmakers in plaintiff's case held any discriminatory views or had any

discriminatory intent).

Even assuming, arguendo, that Plaintiff has set forth a prima facie case of discrimination, Defendant has articulated legitimate, nondiscriminatory reasons for its employment actions. As previously discussed, Mr. Klinedinst stated that the that Plaintiff was terminated because "[t]he [union meeting] incident, coupled with the October 27 threat against Lovell, showed us that Tabor was a danger to our workplace." (Klinedinst Aff. ¶ 14.) This court will not second-guess the employer's decision to take such an action in order to ensure safety in the workplace. See DeJarnette v. Corning Inc., 133 F.3d 293, 299 (4th Cir. 1998) (the court "does not sit as a kind

of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination . . . . Our sole concern is whether the reason for which the defendant discharged the plaintiff was discriminatory." (internal citations and quotations omitted)). Accordingly, any presumption of discrimination that would arise from a prima facie case of discrimination would no longer be present. For reasons similar to those discussed above, there is no evidence demonstrating that Defendant's articulated, legitimate reason is merely pretext.

In sum, after reviewing the record as a whole, this court concludes that Defendant has

demonstrated that there is no genuine issue of material fact for trial. Given the admissible evidence submitted, a reasonable jury could not conclude that Defendant's discipline was based on Plaintiff's race. Defendant has produced evidence demonstrating that no one outside of Plaintiff's protected class engaged in comparable conduct and received less severe discipline for that conduct, and Plaintiff has not produced admissible evidence suggesting otherwise. Additionally, Defendant has produced evidence demonstrating that the disciplinary decisionmaker did not know that Plaintiff was bi-racial, and thus intentional discrimination cannot be reasonably inferred. As Defendant has met its burden of

demonstrating that there is no genuine issue of material fact for trial, and Plaintiff has not produced sufficient evidence to show that there is a genuine issue, summary judgment will be granted.

V. Conclusion

For the reasons set forth herein, Defendant's Motion for Summary Judgment (Doc. 17) is GRANTED. A judgment in accordance with this opinion will be filed contemporaneously herewith.

This the 1st day of May, 2009.

William L. Osteen, Jr.
United States District Judge

No. 10-510

In The
Supreme Court of the United States

ODIS L. TABOR,

Petitioner,

v.

FREIGHTLINER OF CLEVELAND, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Fourth Circuit correctly affirm the District Court's grant of summary judgment to the Respondent in this race discrimination case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, where the undisputed evidence was that the Petitioner was terminated after an investigation showed that he threatened a co-worker with a knife and that there were no similarly situated employees who were treated more leniently?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Daimler Trucks North America LLC, a limited liability company, is not a subsidiary of a publicly held company. The sole shareholder of its only member, Daimler North America Corporation, is Daimler AG, which is publicly traded in the Federal Republic of Germany.

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STATEMENT OF THE CASE

Plaintiff/Petitioner Odis L. Tabor ("Tabor") instituted this action against Defendant/Respondent Freightliner Truck Plant Cleveland LLC[1] ("the Company"), alleging that he was terminated from his employment with the Company because he is "bi-racial," in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"). The evidence showed that Tabor was terminated because of the Company's good-faith belief, after a thorough investigation, that Tabor had pulled a knife on a co-worker at a Union meeting. The U.S. District Court for the Middle District of North Carolina granted the Company's Motion for Summary Judgment, and the U.S. Court of Appeals for the Fourth Circuit affirmed. Tabor filed a timely Petition for Writ of Certiorari with this Court. As will be discussed in more detail below, there is no ground for this Court to grant Tabor's petition for writ of certiorari to review the Fourth Circuit decision.

Freightliner is a brand of Daimler Trucks North America LLC ("DTNA") – North America's leading manufacturer of medium and heavy-duty trucks that serve a wide range of commercial vehicle applications. DTNA has manufacturing plants in Mount Holly and Cleveland, North Carolina, among other locations. The hourly employees at the Cleveland facility are represented by the United Auto Workers Union, Local No. 3520. Tabor was

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[1] Since the Complaint was filed, Freightliner of Cleveland, LLC, has become part of Daimler Trucks North America LLC.

hired at the Cleveland facility on March 3, 2004, and was in that position until his discharge on February 5, 2007. At the times relevant to this action, Tabor was a shop steward for the third shift cab line employees at the Cleveland facility. Tabor has testified that he is bi-racial, that his mother is African-American, and that his father is Caucasian. The Company did not contest these factual assertions; however, it was undisputed that Tabor looks like he is African-American.

Tabor's termination was the climax of an ongoing conflict between Tabor and a co-worker named Jerry "Wayne" Lovell ("Lovell"), who is African-American[2]. Lovell has never been a member of management. Tabor testified that his first confrontation with Lovell took place in late September or early October 2006, when he and a supervisor, Johnny Jones ("Jones"), broke up an argument between Lovell and another employee. During that incident, Lovell allegedly told Tabor that he had no business being a Union representative.

1. The "Overtime Incident" of October 27, 2006

The next incident took place on October 27, 2006 ("the Overtime Incident"). Management had posted a request for three volunteers to work overtime, and the deadline to volunteer was 4:30 a.m. on a Wednesday. Approximately 4:30 a.m.

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[2] By discussing Tabor's conduct at work with respect to Lovell, the Company in no way means to condone the actual or alleged conduct of Lovell, which is discussed *infra*.

Friday, October 27, a lead person told Tabor that management wanted to talk to him. Tabor went to the area where the overtime sign-up sheet was posted, and met with Jones, Randy Wyatt ("Wyatt"), another supervisor, and Mike McGarrity ("McGarrity"), the second shift manager for the cab line. The managers showed him the sign-up sheet: four individuals had volunteered (including Tabor's girlfriend, whom he later married), but because only three were needed they wanted to consult with Tabor about whom to choose. Tabor gave his opinion about which three employees should be scheduled, including his girlfriend[3]. Meanwhile, Lovell approached, and said that he wanted to work overtime. Jones told Lovell that he had missed the deadline, and Lovell argued with him. According to Tabor, Wyatt and McGarrity left at this point and went over to a computer about 10 feet away. Jones then told Lovell that he would let Lovell work overtime if Tabor agreed to it. Tabor said no, and Lovell asked why not. Tabor replied, "What does the book say?" referring to the collective bargaining agreement. According to Tabor, he and Lovell argued for 10-15 minutes[4], the argument became increasingly heated, and Lovell allegedly called Tabor a "white man's nigger." Jones and Wyatt intervened, with Jones blocking Lovell and Wyatt

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[3] It does not appear that Tabor was wrong to have included his girlfriend in the overtime crew, but, as will be discussed below, the selection of Tabor's girlfriend was a large part of the reason for Lovell's perception that Tabor had been unfair.

[4] The Company believes Tabor's 10-15 minute time estimate is grossly exaggerated but has accepted it here solely for purposes of its Motion for Summary Judgment.

blocking Tabor. Lovell then threatened to "kick [Tabor's] ass" and told him to "step outside." Tabor admits that he replied to Lovell, "it's going to be between you and Jesus whether you live or die, because I'm going to drop you." Tabor also admitted telling Lovell, "You're going to have respiratory problems." McGarrity then joined the group and told the two employees to stop it. At Tabor's insistence, the group went to Human Resources.

The third shift Human Resources Assistant for the facility, Amanda Bilyeu, asked Tabor for a written statement regarding the incident, but Tabor refused, saying that he was too upset to provide a statement. Bilyeu then suspended Lovell and Tabor pending further investigation. Tabor admits that he calmed down within 12 hours of the incident and wrote a statement but did not give it to Bilyeu because he was suspended. He admits that he did not provide a written statement to the Company until after his suspension had been completed.

Bilyeu was able to obtain statements from Lovell, McGarrity, Wyatt, and Jones. Lovell denied saying "nigger," and neither McGarrity, Wyatt, nor Jones reported having heard any such thing. McGarrity said that he had left the discussion about overtime shortly after Lovell came over and did not hear what was taking place until the argument seemed to become very heated. Lovell's statement indicates that he felt that Tabor was showing favoritism to his girlfriend, and he admits that he did accuse Tabor of behaving differently when he was around "white management." (In other words, Lovell essentially said that he had accused Tabor of

being an "Uncle Tom" for always siding with "white" management, and was not attacking him for being bi-racial. Indeed, in this regard Lovell appears to have been treating Tabor as if he were African-American.)

More importantly, Lovell's statement also indicates that Tabor had threatened to kill him. (As discussed above, Tabor admitted that he made such threats.)

In the end, Lovell was suspended for five days because he provided a written statement and agreed not to challenge the discipline. The same offer was made to Tabor, but he refused it, so he was suspended for ten days. Both men were directed to attend anger management classes.[5] Tabor grieved his discipline, and meanwhile Lovell filed charges against Tabor with the Union, seeking to have him removed as shop steward.

2. The "Huddle Meeting Incident" of January 5, 2007

Team leaders at the Cleveland facility held daily "huddle meetings" with their employees. As a Union representative, Tabor was sometimes allowed to speak in huddle meetings about Union- and employment-related matters. On January 5, 2007, Tabor was speaking at a "huddle meeting." Lovell arrived approximately five minutes late, and according to Tabor's deposition testimony said,

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[5] This was Tabor's second referral for anger management. He had a similar mandatory referral in July 2005.

"[Tabor] ain't shit, don't listen to what he got to say. He ain't going to be no damn Union rep; he going to be taken care of, and you all crazy as hell for listening to him. You all let him call you all stupid and ignorant. He hang with the white boys." Tabor did not respond to Lovell but reported the incident to Jones, who told him to report it to Human Resources. Bilyeu investigated the incident and, although the witnesses said that Lovell was to blame, most of them had heard him say only, "don't listen to what [Tabor] got to say." One or two witnesses heard him say that Tabor would not be their Union representative much longer, and only one witness heard him say something to the effect of "crazy as damn hell." Based on the witnesses' statements that she received at the time, Bilyeu and Lynn Thayer ("Thayer"), who at the time was Manager of Personnel and Administration, in consultation with Human Resources Manager Rich Klinedinst ("Klinedinst"), concluded that Lovell's behavior was inappropriate but did not rise to a level that required formal discipline. Bilyeu and Thayer counseled Lovell about his behavior and reminded him that Tabor was his Union representative and had been authorized by the team leader to speak at the meeting. Lovell was verbally counselled about his conduct while Tabor was not counseled or reprimanded in any way.

3. The "Knife Incident" of January 13, 2007

The termination event occurred on the following Saturday, January 13, 2007. The Union had scheduled a meeting for that day, at the auditorium of West Rowan High School, which was

to include the selection of jurors for the hearing on Lovell's charges against Tabor. Many Union members who attended were accompanied by their children. The Union officials were sitting on a stage at a table facing the audience section of the auditorium. The sergeant at arms, Todd Scott, was seated in the back, near the door. According to Tabor's deposition testimony, Lovell spoke and then sat down in the audience. Tabor then began talking, and said that Lovell had called him a "white man's nigger." At that point, Lovell got up from his seat and began walking down the aisle toward the stage. When Lovell got within about three feet of Tabor, Tabor turned toward Lovell with what appeared to be one or two knives in his hands. Someone shouted, "He's got a knife!," and the room erupted and the meeting abruptly ended.

The next work day after the incident was Sunday night, January 14, 2007. As Bilyeu was driving to work, she received a call from Robert Whiteside ("Whiteside"), the chief shop steward, who reported that there had been an "incident" the previous day. When she arrived at work, Whiteside and Lovell were waiting to see her, along with co-worker Tara Hendrix ("Hendrix") Whiteside, Lovell, and Hendrix told Bilyeu that Tabor had pulled a knife on Lovell during the Union meeting and reported that co-workers were afraid of Tabor. Bilyeu sent Lovell to a separate office for safety and excused Hendrix. Then Bilyeu called in Tabor, who was already at work, and Steve Barber ("Barber"), a Union representative. In Bilyeu's presence, Whiteside told Tabor that he was no longer a Union representative, and he and Tabor discussed some

other Union "housekeeping" matters. To Bilyeu, Tabor appeared to be very agitated, and she determined that the safest course was to get Tabor out of the workplace. She suspended Tabor pending investigation. At some point during the discussions on the night of January 14, Barber claimed that the knife was actually made of rubber.

Once Lovell[6] and Tabor were suspended, Bilyeu conducted her investigation. She obtained statements from a number of employees, all of which were relatively consistent. In summary, the employee witnesses said that Tabor had been speaking to the Union officials and said that Lovell had called him a "white man's nigger." The audience became upset at this remark, and Lovell, who was sitting a few rows behind Tabor, came into the aisle raising one or both hands so that he could be recognized to speak. None of the witnesses said that that Lovell appeared to be threatening Tabor in any way, but only that he seemed to be trying to get the officials' attention. Most of the witnesses specifically denied that Lovell had done anything inappropriate or threatening. However, when Lovell approached the front of the auditorium where Tabor was, the witnesses said that Tabor turned around and had either one knife, or two knives. Two witnesses said that the knives were shiny, indicating that they were real and not rubber. They said that the sergeant at arms tried to get the knives away from Tabor but that Tabor refused to give them up. A group of men

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[6] The Company reiterates that *Lovell* was suspended as well as Tabor. Lovell was ultimately reinstated because he was determined not to be at fault.

removed Tabor from the building, and another group removed Lovell.

Bilyeu also spoke with Deputy Sheriff Charles Beeker of the Rowan County Sheriff's Department, who had arrested Tabor after the incident and charged him with possession of a weapon on school grounds. Beeker said that he had been called to the scene after the January 13 meeting but that Tabor and Lovell were already gone when he arrived. However, the Union members still at the scene told him that Tabor had had a knife. Beeker told Bilyeu that when he arrested Tabor, Tabor had told him that the knife was plastic and that Tabor had only been "trying to put fear in" Lovell.

Bilyeu presented the information gathered to Klinedinst, who made the decision to terminate Tabor's employment based on his threat to Lovell on October 27, 2006, and the overwhelming evidence that he had pulled a knife or knives at the January 13, 2007, Union meeting.

Tabor claimed that the knife was a toy, but he admitted that (1) several people at the meeting saw him with what *they* thought was a knife; (2) someone yelled, "He got [sic] a knife!"; and (3) Tabor never put the "toy" knife away after pulling it out of his pocket. Moreover, he admitted that the "blade" was dark gray and that the "toy" knife had a hilt, like a real knife.

Tabor made a number of contentions in support of his claim of race discrimination: (1) Caucasian and African-American employees have

been in fights at work and have not been terminated; (2) the employees who gave statements against him in connection with the Union meeting on January 13, 2007, were biased against him because he applied the rules uniformly without regard to race; (3) the Company had no business taking action against Tabor based on conduct he engaged in off-duty and off-premises, and actually committed an unfair labor practice by basing its action on his alleged conduct during a Union meeting; and (4) the Company had no business taking action against Tabor because he was ultimately acquitted of the charge of possession of a weapon on school property. The District Court and the Court of Appeals properly rejected these contentions.

Similarly situated employees. The Company's evidence showed the following: Tabor's (and Lovell's) conduct in connection with the "Overtime Incident" of October 27, 2006, would be considered a "verbal threat." Nine employees were disciplined for making verbal threats during 2006 and 2007: One bi-racial (Tabor), three African-American (Lovell and two others), and five white. Four were suspended for three days (2 black, 2 white), four were suspended for five days (1 black (Lovell), 3 white), and one – Tabor – was suspended for 10 days because he refused to cooperate with the Company's investigation and rejected the Company's offer of a five-day, unprotested suspension.

Each of the other eight employees disciplined for making verbal threats had accepted their penalties unprotested. The reasons for Tabor's lengthier suspension for verbally threatening to kill

Lovell in the Overtime Incident was his own refusal to cooperate with management in the investigation of the incident and his unwillingness to accept the five-day unprotested suspension offered by the Company.

Regarding the "Knife Incident" of January 13, 2007, there was only one employee besides Tabor who had been accused of getting into a fight off-premises. That employee was African-American, and she – like Tabor – was discharged. This former co-worker is the only employee who is truly "similarly situated" to Tabor.

In his summary judgment response, Tabor presented evidence regarding several other employees who engaged in various behaviors and who received various penalties, or no penalties, for their conduct. Some of the employees were not disclosed in the Plaintiff's Answers to Defendant's First Set of Interrogatories or mentioned in only the vaguest terms. The others were either not comparable – for example, several were terminated but reinstated pursuant to contract negotiations with the Union; some were not accused of violent conduct, as was Tabor; some were accused of violent conduct but not use of weapons, unlike Tabor; some were accused of violent conduct that the Company was unable to verify, unlike Tabor. Tabor also cited the employee who, like Tabor, was terminated for off-duty violent conduct toward a co-worker and was never reinstated. These employees' situations did not create a fact issue of disparate treatment.

Alleged bias of hourly, bargaining-unit employees. Apart from the "white man's nigger" comment allegedly made by Lovell, Tabor has presented no evidence apart from his own uncorroborated testimony that any of the 10 other employees who provided statements to Bilyeu in connection with the knife incident were biased against him because he was bi-racial. Therefore, his claim of "bi-racial discrimination" as it relates to these statements has no merit. Even if the employees were all biased against him because he enforced the collective bargaining agreement without regard to race, he was unable to contradict Bilyeu's testimony that she had no reason to believe that the employees who provided statements were on an alleged personal vendetta against Tabor. Indeed, the fact that, on prior occasions, several of the same employees who had provided statements against him in connection with the knife incident had *defended* Tabor on earlier occasions.

In any event, Tabor failed to present any evidence that the comments allegedly made by his co-workers were directed at him because of his bi-racial status. Indeed, Tabor contended (without any evidentiary support) that "he was fired because he insisted on treating people fairly without regard to race in his position of union steward." This is not even remotely a "bi-racial discrimination" issue.

To the extent that his co-workers did not like Tabor, and to the extent that their alleged animus was not a natural consequence of his own behavior, Tabor offered no evidence that would create a fact issue that their alleged animus was based on his bi-

racial status. "White man's nigger" and "house nigger" are primarily intra-racial epithets directed by African-Americans to African-Americans. *See, e.g., Urban Dictionary*[7] (defining "house nigger" as "[a] black person that does their best to please white people even if it means disowning their own racial identity"); *Wikipedia*[8] ("**Uncle Tom** is a pejorative for a black person who is perceived by others as behaving in a subservient manner to White American authority figures, or as seeking ingratiation with them by way of unnecessary accommodation.") Thus, assuming for the sake of argument that employees called Tabor these names, their doing so demonstrates only that they perceived him as African-American.

Employer responsibility for off-duty, off-premises conduct. It is undisputed that the Knife Incident involved an ongoing dispute between two Cleveland facility employees and that many, if not most, of those attending the meeting were employees of the facility. Therefore, the Company undoubtedly had a legitimate interest in becoming involved in the issue: the continuing conflict between Tabor and Lovell was almost certain to spill back into the plant.

Tabor's acquittal of criminal charges in connection with the knife incident. Here, Tabor is comparing apples with oranges. The burden of proof for the prosecution in a criminal case is "guilty

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[7] http://www.urbandictionary.com/define.php?term=house+nigger. Urban Dictionary definitions are submitted by readers.

[8] http://en.wikipedia.org/wiki/Uncle_Tom. (Bold-faced text in original.) Wikipedia information is also submitted by readers.

beyond a reasonable doubt." However, in a civil lawsuit for discrimination, the employee bears the burden of proof, and the only issue is whether the employer honestly believed that the employee engaged in conduct warranting discharge. In any event, Tabor was not acquitted of criminal charges until April 2007, approximately three months after his termination.

SUMMARY OF THE ARGUMENT

The district court's grant of summary judgment, and its affirmance by the Court of Appeals, were entirely proper: that threatening a co-worker with a knife is a legitimate ground for discharge should go without saying.

Tabor presented no evidence, direct or circumstantial, that his termination was motivated by biracial animus. The racial comments allegedly made by his co-workers are not attributable to management, and they were also comments typically directed by African-Americans at African-Americans – in other words, Tabor's evidence shows that his African-American co-workers perceived him as African-American. He had no evidence that management – whether it knew of his "biracial" status or not – made any racial comments, took action against him because he was biracial, or allowed his biracial status to play even a limited role among other causes. Tabor's contention that some management "knew" he was biracial fell far short of creating a genuine issue of material fact that he was discharged *because* he was biracial.

Nor did Tabor's evidence of allegedly "similarly situated" co-workers create a genuine issue of material fact. Among his co-workers, the only one who was truly "similarly situated" to him was African-American, and she was treated exactly the same way he was. Employees who received lesser penalties because they accepted the penalties as settlement of their grievances, or because they committed lesser offenses than Tabor, are not similarly situated to Tabor.

The critical undisputed fact here is that Tabor was terminated because of The Company's honest, good-faith belief, after a thorough investigation, that he threatened a co-worker with a knife. Employee violence (including threats of violence) is clearly a legitimate, non-discriminatory reason for discharge, and Tabor had no evidence that the Company's action was pretextual. Tabor's argument that it was an "unfair labor practice" for the Company to terminate him for threatening violence and brandishing a weapon at a Union meeting is completely without merit. However, even if it were true, it would not help Tabor because the relevant question is whether the Company was motivated by Tabor's *race*. If the Company had any other motivation, then Tabor's "biracial discrimination" claim rightly failed.

In addition to the utter lack of merit of Tabor's case, his Petition for Writ of Certiorari fails to meet the exacting requirements of this Court:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. . . . A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rule 10, Rules of the Supreme Court of the United States. The instant Petition should be denied because (1) the Court of Appeals decision does not conflict with a decision from any other U.S. Court of Appeals or with a decision from the North Carolina Supreme Court; (2) the Court of Appeals has not "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power"; (3) the case does not involve "an important question of federal law that has not been, but should be, settled by this Court,"; and (4) the Court of Appeals decision does not conflict "with relevant decisions of this Court." *See id.*, Rule 10(a) and (c)[9].

[9] Rule 10(b) applies only to decisions from state courts.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S CLAIMS SHOULD NOT HAVE BEEN SUBMITTED TO A JURY BECAUSE HE PRESENTED NO EVIDENCE THAT THE LEGITIMATE, NON-DISCRIMINATORY REASONS OFFERED BY THE RESPONDENT WERE FALSE.

Tabor's contention that the Court of Appeals decision conflicted with this Court's precedent is wrong. Because Tabor has no evidence that the Company's reasons for terminating him were a pretext for "biracial discrimination," it does not avail him to cite *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), in which this Court found that the issue of pretext should have been submitted to a jury because there was evidence showing that the employer's legitimate, nondiscriminatory reasons for the plaintiff's termination were false. Apart from his own speculation, Tabor submitted no such evidence.

Pulling a knife on a co-worker is a legitimate ground for termination; indeed, courts hold that merely threatening a co-worker is. *See, e.g., Worster v. U.S. Postal Service*, 132 F. Supp. 2d 397 (M.D.N.C. 2001) (verbal death threats), *aff'd*, 28 Fed. Appx. 324 (4th Cir. 2002) (unpub.); *Owens v. City of Durham*, 2002 WL 750868 (M.D.N.C. 2002) (threatening behavior); *Morris v. Bellsouth Telecommunications, Inc.*, 302 F. Supp. 2d 515 (M.D.N.C. 2004) (plaintiff's saying she was suicidal and homicidal). *Cf. Thacker v. Brady Services, Inc.*, 367 F. Supp. 2d 882 (M.D.N.C. 2005) (for summary judgment purposes,

assuming plaintiff pushed co-worker), *aff'd*, 144 Fed. Appx. 328 (4th Cir. 2005) (unpub.).

Moreover, the fact that Tabor may claim that he was "provoked" by Lovell does not render his termination for threatening behavior discriminatory. *See, e.g., Worster* (leading up to threat, plaintiff was arguably harassed by Union members for her non-Union views); *Owens* (before threat against co-worker, plaintiff had arguably been harassed by him).

Moreover, even if, instead of one or two shiny knives, Tabor had a toy knife, this would change nothing. By his own description, the "toy" knife resembled a real knife, and he was using it in a tense situation, indicating that there was no reason for anyone to believe that Tabor was joking or engaging in horseplay. Indeed, the Sheriff's Department reported that Tabor had said he deliberately used the knife to "put a scare into" Lovell.

The U.S. Courts of Appeal have held that the threatening use of a toy weapon can result in a criminal conviction, a much greater burden to satisfy than providing a legitimate, non-discriminatory reason for discharge. *See, e.g., U.S. v. Martinez-Jiminez*, 864 F.2d 664 (9th Cir.), *cert. denied*, 489 U.S. 1099, 109 S. Ct. 1576, 103 L. Ed. 2d 942 (1989) (non-assaultive use of toy gun in bank robbery was "dangerous weapon" within meaning of federal bank robbery statute and could form basis for criminal conviction of armed bank robbery). *See also U.S. v. Medved*, 905 F.2d 935, 939-40 (6th Cir. 1990), *cert.*

denied, 498 U.S. 1101, 111 S. Ct. 997, 112 L. Ed. 2d 1080 (1991) (following *Martinez-Jiminez* in context of armed bank robbery).

Tabor further contends that the Court of Appeals erred by failing to consider that, because his alleged misconduct occurred off-duty and off-premises, the employer had no business interfering. This contention is also wrong. An employer is often responsible, and may face legal liability, for employee misconduct that occurs off premises and during the employee's off-duty hours – particularly when that misconduct involves a co-worker. *See, e.g.*, *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128 (2d Cir. 2001) (rape of plaintiff by co-worker in co-worker's hotel room during flight layover while both were off duty), *cert. denied*, 537 U.S. 824, 123 S. Ct. 110, 154 L. Ed. 2d 34 (2002); *Magraff v. Lowes HIW, Inc.*, 2005 WL 2293648 (D. Colo. 2005) (rape of plaintiff by co-worker during off-site private party, while both were off duty). *Cf. Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342 (11th Cir. 2006) (where sheriff's deputies had agreed not to engage in conduct that reflected poorly on department, held that termination of deputies for "acting" for compensation in pornographic video material displayed on internet was legitimate ground for discharge, notwithstanding that activity was engaged in off-duty and off-premises).

Tabor's "unfair labor practice" argument completely lacks merit. He cites no authority for his amazing proposition that it would be illegal "interference" for an employer to discharge an employee for threatening the life of a co-worker (and

fellow member of the bargaining unit) at a Union meeting. He ignores pertinent language from the case he primarily relies upon: *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724 (5th Cir. 1970). In finding that it was improper for an employer to terminate a Union employee for accusing management of "lying" during a labor-management grievance meeting, the court said, "*As long as the activities engaged in are lawful* . . . the employees are protected . . .." 430 F.2d at 731 (emphasis added). Moreover, unlawful interference under Section 8(a)(1) of the National Labor Relations Act ("NLRA") must be reasonably coercive or intimidating to employees, *see, e.g., NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997). In this case, co-workers were intimidated, not by the Company but rather by Tabor himself. Under Section 8(a)(3) of the NLRA, the employer must be motivated by anti-union animus, *see, e.g., Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981). There is no evidence whatsoever that the Company has animus against the Union; indeed, Tabor's adversaries and victims were members of the same bargaining unit. Section 8(a)(2) of the NLRA prohibits "employer dominance or interference with the formation or administration of any labor organization" and was aimed at prohibiting "company unions." *See, e.g., NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 266, 58 S. Ct. 571, 574, 82 L. Ed. 2d 831 (1938). There is no possible interpretation of the undisputed facts in this case that would lead to a finding that the Company was trying to "dominate" or "interfere with" the Union. Nor is there any basis for Tabor to contend that the NLRA somehow "protects" his "right" to threaten a

co-worker with a knife – real or fake – as long as he does it under cover of a Union meeting.

Finally, even if the Company *had* interfered with, dominated, or discriminated against Tabor because of his exercise of NLRA rights, this would not make the Company's (hypothetical) conduct a pretext for bi-racial discrimination – rather, it would undercut Tabor's claim that he was discriminated against because of his race. There would still have to be some reason for a trier of fact to believe that Tabor's race was the true motivation for the allegedly unlawful conduct.

Finally, because the burdens of proof in criminal prosecutions and civil actions for employment discrimination are so different, the fact that Tabor was acquitted of criminal charges is completely irrelevant to his discrimination case. As will be discussed below, the relevant inquiry for discrimination purposes is whether the employer had an honest belief that the employee engaged in the misconduct, not whether the employee was "guilty beyond a reasonable doubt."

II. PETITIONER WAS UNABLE TO CALL INTO QUESTION RESPONDENT'S GOOD-FAITH BELIEF THAT PETITIONER HAD ENGAGED IN MISCONDUCT WARRANTING DISCHARGE.

Although the employer in a discrimination case has the burden to articulate a legitimate non-discriminatory reason for the action taken, the burden of proof remains with the plaintiff at all

times. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

Tabor makes much of the fact that he was acquitted of criminal charges in connection with the "toy" knife, as if that were dispositive on the discrimination issue. In fact, it is not: in a discrimination case, the employer can be flat wrong so long as it acted based on an honest belief that the employee engaged in misconduct that would result in termination. *See, e.g., Hawkins, supra*, 203 F.3d at 279 (4th Cir. 2000), *quoting DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) ("when an employer gives a legitimate, non-discriminatory reason for discharging the plaintiff, it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination"); *Thacker, supra*, 367 F. Supp. 2d at 890 (quoting same passage from *Hawkins*). The other circuits agree. *See, e.g., Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) ("To discredit the employer's proffered reason . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent"); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (in age discrimination case, it did not matter if witnesses accusing plaintiff of sexual harassment

were "lying through their teeth"; relevant inquiry is whether employer terminated plaintiff based on belief that plaintiff had sexually harassed and retaliated against employees).

The courts do not sit as "super-personnel departments," second-guessing employers' decisions. *See, e.g., DeJarnette, supra,* at 298-99. Again, the other circuit courts of appeal agree with the Fourth Circuit. *See, e.g., Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988).

The foregoing principles apply all the more in this case, where Tabor admitted that he had deliberately set out, at the very least, to create the impression that he had engaged in the misconduct at issue (that is, that he pulled what appeared to be a deadly weapon on a co-worker with the intent of intimidating him).

Finally, as stated above, every Cleveland facility employee who was alleged to have engaged in conduct somewhat similar to Tabor's in the Overtime Incident (making a verbal threat) agreed to an unprotested suspension. These employees are not similarly situated to Tabor and therefore cannot provide support for his "bi-racial discrimination" claim. *Cf., e.g., Hearne v. United Parcel Service, Inc.*, 2007 WL 3287758 at *13 (E.D.N.C. 2007) (reinstatement of employees during grievance process is not evidence of disparate treatment of plaintiff because, with respect to former, employer's decision is not voluntary).

With respect to the Knife Incident, there was only one remotely similarly situated employee: an African-American who allegedly got into a fight with a co-worker off-premises and off-duty. This employee – like Tabor – was also terminated; thus, her discharge cannot provide circumstantial evidence of discrimination.

CONCLUSION AND RELIEF SOUGHT

For all of the reasons set forth above, the Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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